Office - Supreme Court, U.S.
FILED
SEP 10 1981

No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER

v.

J.J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

BARRY SULLIVAN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

PAT G. NICOLETTE
Deputy General Counsel

GREGORY C. GLYNN
Associate General Counsel

MARK D. YOUNG
Assistant General Counsel

NANCY E. YANOFSKY
Attorney

Commodity Futures Trading Commission
Washington, D.C. 20581

QUESTION PRESENTED

Whether Congress in 1974, when it comprehensively reformed the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, extinguished the private right of action then available to customers defrauded by their commodity professionals in violation of Section 4b of the Act, 7 U.S.C. (1970 ed.) 6b.

TABLE OF CONTENTS

	Page
Interest of the Commodity Futures Trading Commission	1
Statement	2
Summary of Argument	4
Argument:	
I. When Congress amended the Commodity Exchange Act in 1974, it did not intend to eliminate the private right of action that the courts had uniformly recognized for commodity customers defrauded by their commodity professionals in violation of Section 4b	5
II. The recognition of a private right of action under Section 4b is warranted even under the test of *Cort* v. *Ash*	23
Conclusion	32

TABLE OF AUTHORITIES

Cases:

Anderson v. *Francis I. duPont & Co.*, 291 F. Supp. 705	6
Arnold v. *Bache & Co.*, 377 F. Supp. 61	6
Bache Halsey Stuart, Inc. v. *French*, 425 F. Supp. 1231	21
Barker v. *Commodity Management Systems, Inc.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶¶ 20,432 (June 2, 1977) and ¶ 20,634 (June 21, 1978), petition for review dismissed *sub nom. Barker* v. *CFTC*, No. 78-3141 (5th Cir. 1978), cert. denied, 440 U.S. 980	15-16
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723	6
Booth v. *Peavey Company Commodity Services*, 430 F.2d 132	6

Cases—Continued Page

California v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981) 7, 24, 26, 30, 31
Cannon v. *University of Chicago*, 441 U.S. 677 ..... 6, 26, 27, 28, 30
Carlson v. *Green*, 446 U.S. 14 8-9
Case & Co. v. *Board of Trade of the City of Chicago*, 523 F.2d 355 5
Chicago Mercantile Exchange v. *Deaktor*, 414 U.S. 113 18
Cort v. *Ash*, 422 U.S. 66 ..... 3-4, 5, 24, 26, 27, 28, 31
EEOC v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981) 22
Enquist v. *Quaker Oats Co.*, 327 F. Supp. 347 10
Goodman v. *H. Hentz & Co.*, 265 F. Supp. 440 5
Gould v. *Barnes Brokerage Co.*, 345 F. Supp. 294 6
Hecht v. *Harris, Upham & Co.*, 283 F. Supp. 417, modified, 430 F.2d 1202 6
Higginbotham v. *Barrett*, 473 F.2d 745 10
Hirk v. *Agri-Research Council, Inc.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,738 (N.D. Ill. 1974), aff'd in relevant part, 561 F.2d 96 6
Hirk v. *Agri-Research Council, Inc.*, 561 F.2d 96 21
International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42 26
Johnson v. *Arthur Espey, Shearson, Hamill & Co.*, 341 F. Supp. 764 6
Kardon v. *National Gypsum Co.*, 69 F. Supp. 512 ..... 5, 6
Leist v. *Simplot*, 638 F.2d 283, cert. granted, Nos. 80-757, 80-895 & 80-936 (Feb. 23, 1981) 15, 17-18
Lorillard v. *Pons*, 434 U.S. 575 22
Maine v. *Thiboutot*, 448 U.S. 1 ..... 8, 11
Middlesex County Sewerage Authority v. *National Sea Clammers Ass'n*, No. 79-1711 (June 25, 1981) 7, 8, 9, 10, 14, 15, 27-28
Milani v. *ContiCommodity Services, Inc.*, 462 F. Supp. 405 21
Moore v. *Chesapeake & Ohio Ry.*, 291 U.S. 205 26
McCurnin v. *Kohlmeyer & Co.*, 340 F. Supp. 1338 6
McKnett v. *St. Louis & S.F. Ry.*, 292 U.S. 230 12

Cases—Continued Page

New York Mercantile Exchange v. *Leist*, Nos. 80-757, 80-895, & 80-936, cert. granted (Feb. 23, 1981) 2
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 15
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 22
Paine, Weber, Jackson & Curtis, Inc. v. *Rosciszewski*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,175 (S.D. Cal. Apr. 16, 1981) 17
Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1.... 31
Power Reactor Co. v. *Electricians*, 367 U.S. 396.... 22
Rice v. *Board of Trade of the City of Chicago*, 331 U.S. 247 10
Rivers v. *Rosenthal & Co.*, 634 F.2d 774, petition for cert. pending, No. 80-1542 (filed Mar. 10, 1981) 9
Rosenthal & Co. v. *CFTC*, 614 F.2d 1121 14
Steele v. *Louisville & Nashville R.R.*, 323 U.S. 192.. 26
Texas & Pacific Ry. v. *Rigsby*, 241 U.S. 33 26
T.I.M.E. Inc. v. *United States*, 359 U.S. 464 17
Trafficante v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 22
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 ..... 4, 7, 27
United States v. *Rutherford*, 442 U.S. 544 22
Wichelman v. *Monex International, Ltd.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,228 (N.D. Cal. July 24, 1981) 30-31

Statutes and regulations:

Commodity Exchange Act, 7 U.S.C. (& Supp. III) 1 *et seq.* 1
Section 2(a)(1), 7 U.S.C. 2 ..... 2, 8, 9, 11, 28, 31
Section 2(a)(1), 7 U.S.C. (Supp. III) 2 8
Section 4b, 7 U.S.C. (1940 ed.) 6b 4, 24
Section 4b, 7 U.S.C. (1964 ed.) 6b 5-6
Section 4b, 7 U.S.C. (1970 ed.) 6b 4
Section 4b, 7 U.S.C. 6b ..... *passim*
Section 4b(B), 7 U.S.C. 6b(B) 24

Statutes and regulations—Continued

	Page
Section 4b(C), 7 U.S.C. 6b(C)	24
Section 4c, 7 U.S.C. (1970 ed.) 6c	10
Section 4d(1), 7 U.S.C. (Supp. III) 6d(1)	2
Section 5a(11), 7 U.S.C. 7a(11)	20, 30
Section 5a(11)(ii), 7 U.S.C. 7a(11)(ii)	20
Section 6(b), 7 U.S.C. 9	13
Section 6d(s), 7 U.S.C. (Supp. III) 13a-2(2)	12
Section 6d(3), 7 U.S.C. (Supp. III) 13a-2(3)	13
Section 6d(7), 7 U.S.C. (Supp. III) 13a-2(7)	11
Section 14, 7 U.S.C. 18	2, 8, 18, 20, 29, 30
Section 14(a), 7 U.S.C. (& Supp. III) 18(a)	14, 16, 17, 19, 28
Section 14(b), 7 U.S.C. (Supp. III) 18(b)	17
Section 14(e), 7 U.S.C. 18(e)	14
Section 14(f), 7 U.S.C. 18(f)	19
Section 14(g), 7 U.S.C. 18(g)	19
Section 14(i), 7 U.S.C. 18(i)	15
Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 *et seq.*:	
Section 402(b), 88 Stat. 1413	10
Section 412, 88 Stat. 1414	16
Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1365(e)	9
Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865	22
Securities Act of 1933, 15 U.S.C. 77a *et seq.*	3
Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*	3
15 U.S.C. (1940 ed.) 78j(b)	6
Pub. L. No. 90-258, Section 5, 82 Stat. 27	25
7 U.S.C. 209	18, 20
7 U.S.C. 210	18
7 U.S.C. 499e	18, 20
7 U.S.C. 499f	18
28 U.S.C. 1441	12
17 C.F.R. 12.21(a)(7)	20
17 C.F.R. 12.22	20

Miscellaneous: Page

Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J. Corp. L. 217 (1976) 21
Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry, 93d Cong., 2d Sess., Pts. 1 & 3 (1974) 20, 28
Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture, 93d Cong., 2d Sess. (1974) 6-7
78 Cong. Rec. 10452 (1934) 26
80 Cong. Rec. 7911 (1936) 25
120 Cong. Rec. (1974):
p. 30464 11
p. 34737 ..... 10, 16
p. 34997 ..... 10, 16, 29
124 Cong. Rec. (daily ed. July 12, 1978):
p. S10537 22
pp. S10561-S10562 ..... 12, 13, 30
p. S10562 13
124 Cong. Rec. S16527 (daily ed. Sept. 28, 1978) .. 13, 22
40 Fed. Reg. 55667 (1975) 1, 22
41 Fed. Reg. 3994, 3995 (1976) 20
Hearing Before the Commodity Futures Commission on Arbitration and Other Dispute Settlement Procedures (Mar. 5, 1976) 21
Hearings on H.R. 11930 and H.R. 12317 Before the House Comm. on Agriculture, 90th Cong., 1st Sess. (1967) 25
Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913) 26
H.R. 7608, 72d Cong., 1st Sess. § 4A (Jan. 13, 1932) 25
H.R. 12287, 72d Cong., 1st Sess. § 4b (May 24, 1932) 25

Miscellaneous—Continued Page

H.R. 13113, 93d Cong., 2d Sess. § 105 (1974) 18
H.R. Rep. No. 1551, 72d Cong., 1st Sess. (1932).. 25
H.R. Rep. No. 1522, 73d Cong., 2d Sess. (1934).. 26
H.R. Rep. No. 421, 74th Cong., 1st Sess. (1935).. 26, 29
H.R. Rep. No. 93-975, 93d Cong., 2d Sess. (1974).. 16, 18, 19, 29
H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. (1978) 11, 12, 13
Hudson, *Consumer Protection in the Commodity Futures Market*, 58 B.U.L. Rev. 1 (1978) 21
Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1 (1976) 10, 21
Memorandum Regarding Proposed Antifraud Rules, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,044 (May 16, 1975) 21
1980 Commodity Futures Trading Commission Annual Report 30
Reauthorization of the Commodity Futures Trading Commission: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess., Pt. 2 (1978) 21-22, 23
Regulation of Grain Exchanges: Hearing on H.R. 8829 Before the House Comm. on Agriculture, 73d Cong., 2d Sess. (1934) 26
Schneider, *Commodities Law and Predispute Arbitration Clauses*, 6 Hofstra L. Rev. 129 (1977).. 21
S. Rep. No. 1431, 74th Cong., 1st Sess. (1935)..... 25-26
S. Rep. No. 947, 90th Cong., 2d Sess. (1968)..... 25
S. Rep. No. 93-1131, 93d Cong., 2d Sess. (1974)..9-10, 19, 29
S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. (1974) 10, 19
S. Rep. No. 95-850, 95th Cong., 2d Sess. (1978)..2, 11, 12, 14, 15, 29-30

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-203

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., PETITIONER

v.

J.J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

INTEREST OF THE COMMODITY FUTURES TRADING COMMISSION

The Commodity Futures Trading Commission is an independent federal agency created by Congress in 1974 to administer the Commodity Exchange Act, 7 U.S.C. (& Supp. III) 1 *et seq.* The Act establishes a pervasive and exclusive scheme for regulating the trading of commodity futures contracts in the United States. See 7 U.S.C. (Supp. III) 2.

The question presented in this case is whether a private right of action is available to commodity customers who have been defrauded in violation of Section 4b (7 U.S.C. 6b), the principal antifraud provision of the Act. Since its inception, the Commission has construed the Act as continuing to afford this remedy, which was well-recognized by the courts when Congress amended the Act in 1974. See 40 Fed. Reg. 55667 n.10 (1975). In the Commission's view,

private actions to redress violations of Section 4b are an important adjunct to the Commission's own enforcement efforts and thereby provide an additional deterrent to fraudulent practices. Moreover, the availability of private rights of action as an alternative to the administrative reparations procedure created in 1974 (see 7 U.S.C. 18) enables the Commission to fulfill more effectively Congress' goal that the reparations procedure should provide an expeditious and simple remedy "analogous to the operation of a small claims court." S. Rep. No. 95-850, 95th Cong., 2d Sess. 11, 16 (1978).

The Commission's interest here thus rests on its view that private litigation under Section 4b remains an essential part of the overall administrative and enforcement scheme of the Act.[1]

STATEMENT

In April 1973, respondents J.J. Curran and Jacquelyn L. Curran opened accounts with petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc., for trading commodity futures contracts (J.A. 10).[2]

---

[1] In *New York Mercantile Exchange* v. *Leist*, cert. granted, Nos. 80-757, 80-895 & 80-936 (Feb. 23, 1981), the Commission has presented its view that the 1974 Congress did not extinguish the private right of action that previously had been held to exist under the Act for traders injured by the manipulation of the price of a futures contract. To some extent, the arguments that we advanced in our brief amicus curiae in those cases are also relevant here, and those arguments will be incorporated by reference, where appropriate, to avoid unnecessary repetition. That brief, copies of which have been served on the parties in this case, will be referred to as "CFTC Br."

[2] Merrill Lynch is a futures commission merchant, which solicits and accepts customer orders for the purchase and sale of futures contracts, and is registered with the Commission. See Sections 2(a)(1) and 4d(1) of the Act, 7 U.S.C. (Supp. III) 2 and 6d(1).

Additional accounts were opened in August 1973 (*ibid.*) By April 1974, when Merrill Lynch finally acquiesced in respondents' demand that their accounts be closed, substantial losses had been sustained (*id.* at 14-15). Thereafter, in April 1976, respondents commenced this action in the United States District Court for the Eastern District of Michigan, claiming that they had been harmed by Merrill Lynch's fraudulent practices, which violated Section 4b of the Commodity Exchange Act, 7 U.S.C. 6b (J.A. 19; Pet. App. A-43).[3] Respondents alleged that they lost $175,000 because of these practices and that Merrill Lynch wrongfully gained from them some $45,000 in commissions (J.A. 16). With respect to respondents' Section 4b claim, the district court ordered that the proceedings be stayed pending arbitration pursuant to the provisions of a form agreement that respondents had signed (Pet. App. A-50).

The court of appeals held that the district court erred in granting this stay and therefore proceeded to determine whether a private right of action exists under Section 4b (Pet. App. A-23 to A-24). By divided vote, the court of appeals held (*id.* at A-30 to A-34) that respondents were entitled to maintain a private right of action. The court applied the four-part test for ascertaining congressional intent that this Court established in *Cort* v. *Ash*, 422 U.S. 66

---

[3] Respondents alleged that Merrill Lynch's practices also violated various provisions of the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, and state statutory and common law (see J.A. 19; Pet. App. A-2). The district court granted partial summary judgment in favor of Merrill Lynch on the federal securities law claims (Pet. App. A-39 to A-50), and the court of appeals affirmed this aspect of the district court's judgment (*id.* at A-36 to A-37).

(1975), and concluded (Pet. App. A-36) that "Congress [had not] intended [in 1974] to extinguish the pre-existing private right of action which had been generally acknowledged to exist under the Act."

SUMMARY OF ARGUMENT

This Court's recent decisions emphasize that the question whether a private right of action is available under a federal statute that does not explicitly provide such a remedy is a question of congressional intent to be resolved in accordance with customary principles of statutory construction. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979). Thus, the federal courts must normally determine whether Congress implicitly intended to create such a remedy in enacting a statute. In this case, however, the availability of a private remedy for commodity customers defrauded in violation of Section 4b of the Commodity Exchange Act, 7 U.S.C. (1970 ed.) 6b, was undisputed in 1974 when Congress strengthened the Act by providing new enforcement mechanisms, including additional remedies for customers. Congress was aware in 1974 that the courts had unanimously held that a private remedy was available under Section 4b.

In these circumstances, the focus of inquiry in ascertaining legislative intent must be placed, not on whether Congress intended to *create* a private remedy in 1974, but on whether Congress intended to *extinguish* an already existing private remedy. No other analysis would be consistent with the historical and legal context in which Congress acted. In 1974, Congress manifested no intention to extinguish this remedy, either by making exclusive the additional remedies that it provided or otherwise. Indeed, Congress affirmatively indicated that private rights of action should continue to be available.

At all events, the continued recognition of a private right of action under Section 4b is also mandated under the four-part test articulated by this Court in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). First, Congress clearly enacted Section 4b for the especial benefit of commodity customers. Second, Congress evidenced its intention that private rights of action should continue to be available. Third, private rights of action provide a meaningful and necessary supplement to the Commission's efforts to enforce Section 4b, the principal antifraud provision of the Act. Finally, the regulation of commodity futures trading is manifestly an area of federal concern.

ARGUMENT

I. WHEN CONGRESS AMENDED THE COMMODITY EXCHANGE ACT IN 1974, IT DID NOT INTEND TO ELIMINATE THE PRIVATE RIGHT OF ACTION THAT THE COURTS HAD UNIFORMLY RECOGNIZED FOR COMMODITY CUSTOMERS DEFRAUDED BY THEIR COMMODITY PROFESSIONALS IN VIOLATION OF SECTION 4b

1. In 1974, when Congress amended the Commodity Exchange Act (see CFTC Br. 10 & n.4), it was "undisputed that a private cause of action may be maintained under the * * * Act." *Case & Co.* v. *Board of Trade of the City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975). The first reported decision to address this question was *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440, 447 (1967), in which the United States District Court for the Northern District of Illinois, applying the "well accepted" rule of *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), held that a private damage remedy was available for commodity customers, who "fall directly within the class of persons Congress sought to protect by enacting" Section 4b of the Act, 7

U.S.C. (1964 ed.) 6b.[4] Without exception, the federal courts thereafter upheld the right of commodity customers to bring private actions for damages resulting from fraudulent conduct by commodity professionals in violation of Section 4b.[5] Moreover, it is clear that the 1974 Congress was aware of the then-current state of the law. The legislative history shows that Congress was repeatedly informed that the federal courts were adjudicating private damage claims under various provisions of the Act,[6] including fraud claims brought by customers against futures commission merchants (see CFTC Br. 11-12).[7]

---

[4] The *Kardon* court implied a private remedy under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. (1940 ed.) 78j(b). This Court has subsequently confirmed the existence of that remedy. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

[5] See *Hirk* v. *Agri-Research Council, Inc.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,738 (N.D. Ill. 1974), aff'd in relevant part, 561 F.2d 96 (7th Cir. 1977); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61 (M.D. Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hamill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972); *Booth* v. *Peavey Company Commodity Services*, 430 F.2d 132 (8th Cir. 1970); *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), modified, 430 F.2d 1202 (9th Cir. 1970).

[6] Even where the legislative history of a statute does not explicitly reflect such an awareness, "it is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979).

[7] The general counsel of Continental Grain Co. advised Congress in 1974 that the federal courts had "already held they have jurisdiction over private complaints based on violations of the present law." *Commodity Futures Trading Commis-*

Given this legislative context, it is anomalous for petitioner to suggest (Pet. Br. 4) that the continued availability of a private right of action under the Act should depend upon whether Congress affirmatively evidenced its intention to *create* such a remedy in 1974. Quite simply, there was no reason for the 1974 Congress to create a remedy that it knew to exist. Therefore, if the intent of Congress is to be ascertained with accuracy in these circumstances,[8] the question that must be answered is whether Congress manifested any intention to *extinguish* that remedy in 1974. See CFTC Br. 12-16 & n.16. To hold otherwise would be to ignore the context in which Congress acted.

To be sure, this Court has not previously structured its inquiry in this manner because it has not had occasion to decide a private right of action case in which Congress enacted significant amendments to a statute, to strengthen enforcement of its provisions, after the existence of an implied right of action had become well-settled. CFTC Br. 12-13. In such circumstances, we submit, the burden must rest

---

sion Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture, 93d Cong., 2d Sess. 321 (1974) (remarks of Sheldon L. Berens). Indeed, without exception, the commodity industry representatives who testified during consideration of the 1974 amendments informed Congress that private actions could then be brought under the Act. See CFTC Br. 11-12 & n.5.

[8] In determining whether a private right of action is to be implied under a federal statute, "[t]he key to the inquiry is the intent of the legislature." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, No. 79-1711 (June 25, 1981), slip op. 10-11. Even in ordinary circumstances, however, the historical and legal context in which Congress acted must be considered if congressional intent is truly to be ascertained. See, *e.g.*, *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981), slip op. 5, 8 n.7; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979).

on the party asserting that Congress intended to repudiate the legal status quo. Because petitioner contends that Congress intended to abrogate the private remedy that had previously been recognized under Section 4b, petitioner must shoulder that burden here. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, No. 79-1711 (June 25, 1981), slip op. 19 n.31.[9]

Petitioner acknowledges, of course, that Congress did not explicitly declare its intention to extinguish a private right of action in 1974, but contends (Pet. Br. 9-15, 20), in essence, that Congress' provision of an administrative reparations remedy (7 U.S.C. 18) and vesting of exclusive jurisdiction in the Commission (7 U.S.C. 2) constitute sufficient indirect evidence to show that Congress implicitly intended to accomplish this result. However, as the court of appeals correctly held (Pet. App. A-36), Congress did not manifest any intention in 1974 to extinguish a private remedy.[10] Cf. *Carlson* v. *Green*, 446 U.S.

---

[9] In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, *supra*, slip op. 16, the Court considered whether Congress in 1972, when it created express statutory remedies under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et. seq.*, and the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052, 33 U.S.C. 1401 *et seq.*, intended to supplant any remedy that might be available (although not then authoritatively recognized by this Court) under 42 U.S.C. 1983. See *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). The Court placed the burden of proving congressional intent on the party contending that the 1972 remedies were exclusive (*Middlesex County*, *supra*, slip op. 19 n.31), but held on the record there "that the existence of these express remedies demonstrates * * * that Congress * * * intended to supplant any remedy that otherwise would be available under § 1983" (*id.* at 19).

[10] No court of appeals has held otherwise. The Fifth Circuit, which is the only court of appeals to conclude that a

14 (1980). To the contrary, the provisions of the Act relied upon by petitioner, and the legislative history of those provisions, show that Congress intended that this remedy should continue to be available under Section 4b for customers who have been defrauded by their commodity professionals.

2. As we have previously explained (see CFTC Br. 17-22), the exclusive jurisdiction provision and the judicial savings clause that Congress added in 1974 to Section 2(a)(1) of the Act, 7 U.S.C. 2, affirmatively demonstrate Congress' intent that the federal courts would continue to adjudicate private rights of action under the Act.[11] Thus, Congress clearly ex-

---

private right of action is no longer available under Section 4b, stated the question as whether the 1974 legislative history shows that Congress intended at that time to adopt or incorporate a private right of action as part of the Act. See *Rivers* v. *Rosenthal & Co.*, 634 F.2d 774, 785 (1980), petition for cert. pending, No. 80-1542 (filed Mar. 10, 1981). The Fifth Circuit acknowledged, however, that application of the approach we suggest here, and which was employed by the Sixth Circuit in this case, "very well might—indeed, probably *would*—produce a different final result" (*id.* at 785 n.17; emphasis in original).

[11] In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n, supra*, the Court found that the particular savings clause involved there did not support the existence of a private right of action. The circumstances presented in that case, however, are distinguishable from those presented here. Unlike the savings clause in the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1365(e) (see *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n, supra*, slip op. 13 & n.26), the judicial savings clause in the Commodity Exchange Act is not limited by either its language or its legislative history. Indeed, the legislative history of this savings clause establishes that Congress enacted the clause to ensure that "nothing in the Act" (presumably including the expressly provided reparations and enforcement remedies) would affect the jurisdiction previously conferred on the courts. See S. Rep. No. 93-1131, 93d Cong.,

pected and intended that customer fraud claims under Section 4b, which had uniformly been recognized as adjudicable in the federal courts before 1974 (see pages 5-6 and note 5, *supra*), would continue to be brought in the federal courts.

Indeed, Congress evidenced its intention concerning the continued availability of the federal courts to adjudicate Section 4b claims when it deleted from the Act the provision that stated: "Nothing in * * * section [4]b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections." 7 U.S.C. (1970 ed.) 6c.[12] Congress removed this provision to ensure that the preemption of state regulatory statutes that it sought to accomplish in enacting the exclusive jurisdiction provision would be complete. See S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 35-36 (1974).[13] However, Senator Curtis acknowledged in proposing this amendment that "Federal and State courts are

---

2d Sess. 23 (1974); 120 Cong. Rec. 34737 (1974) (remarks of Rep. Poage); *id.* at 34997 (remarks of Sen. Talmadge). Moreover, in contrast to the circumstances presented in this case, Congress could not have intended that the savings clause involved in *Middlesex County* would preserve any private right of action that had previously been held to exist under the Federal Water Pollution Control Act because no such remedy had been recognized. See, *e.g.*, *Higginbotham* v. *Barrett*, 473 F.2d 745, 748 (5th Cir. 1973); *Enquist* v. *Quaker Oats Co.*, 327 F. Supp. 347, 348 (D. Neb. 1971).

[12] See Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, Section 402(d), 88 Stat. 1413.

[13] See Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1, 2 (1976). Congress was obviously aware of the decision in *Rice* v. *Board of Trade of the City of Chicago*, 331 U.S. 247, 255 (1947), in which the Court specifically relied upon this provision in holding that the Act did not preempt application of state regulatory statutes to commodity futures trading.

to retain jurisdiction" over claims arising under the federal statute, and he stated that his purpose was to ensure that "even in the cases where the * * * State courts retain jurisdiction, the Federal substantive law embodied in the Commodity Exchange Act * * * would govern" (120 Cong. Rec. 30464 (1974)). Accord, *ibid.* (remarks of Sen. Talmadge).[14]

These remarks clearly show that Congress contemplated that the state courts, pursuant to their gen-

[14] These expressions of congressional intent are irreconcilable with petitioner's assertion (Pet. Br. 39 n.61) that "state court jurisdiction, except over contract and commercial rights, has been preempted by the 'exclusive jurisdiction' of the CFTC." Indeed, that assertion is patently inconsistent with the language of the savings clause (Section 2(a)(1) of the Act, 7 U.S.C. (Supp. III) 2), which broadly preserves the jurisdiction of the courts, federal and state, without any apparent limitation. Congress certainly could have drafted the savings clause to accomplish the broad result that petitioner suggests to have been its purpose, and, if it had done so, Congress could reasonably be said to have intended not to preserve the preexisting private right of action under the Act. However, given the fact that Congress drafted the judicial savings clause without limiting it in any way, it is reasonable to conclude that it intended the savings clause to preserve the courts' jurisdiction with respect to previously recognized rights of action, among other things. Cf. *Maine* v. *Thiboutot*, *supra*, 448 U.S. at 4 (broad interpretation of statute adopted "[g]iven that Congress attached no modifiers to the phrase"). Finally, petitioner's view that the provision granting exclusive regulatory jurisdiction to the Commission has preempted adjudication of all but state law contract claims cannot be squared with the amendments passed by Congress in 1978, which made clear that state fraud statutes of general applicability had not been preempted in 1974 and thus may continue to be enforced even by state officials in state court. See 7 U.S.C. (Supp. III) 13a-2(7). See also S. Rep. No. 95-850, 95th Cong., 2d Sess. 25 (1978); H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 16 (1978). Actions may be brought under such state statutes if they are applied in a manner consistent with the Act and the Commission's regulations. See CFTC Br. 19 n.19.

eral jurisdiction, would entertain commodity claims involving the substantive standards embodied in the Act, including, of course, those contained in Section 4b. Cf. *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 233-234 (1934). Accordingly, Congress also must have intended that the federal courts would continue to adjudicate private rights of action under Section 4b. Otherwise, customers would be able to seek judicial relief for claims under Section 4b only in the state courts, and defendant futures commission merchants would be unable to remove such cases to the federal courts under 28 U.S.C. 1441. Congress could not have intended this anomalous result with respect to claims arising under an exclusively federal regulatory scheme.[15] In fact, Congress in 1978 made explicit its preference that claims under the Act be adjudicated in the federal courts by providing that the federal courts should be the sole forum for enforcement actions brought by state officials under the Act. See Section 6d(2) of the Act, 7 U.S.C. (Supp. III) 13a-2(2); 124 Cong. Rec. S10561-S10562 (daily ed. July 12, 1978) (remarks of Sens. Bellmon and Leahy).[16]

---

[15] Moreover, if petitioner's view of the exclusivity of the reparations procedure were correct (see Pet. Br. 14-15), one would have to assume, in light of Congress' view that state courts could adjudicate claims under Section 4b, that Congress intended that state court actions would be subject to removal, not to the federal courts, but to the Commission.

[16] In 1978, Congress sought to ensure that state law enforcement resources would be available to deter and punish substantial, widespread violations of the Act. Cf. 124 Cong. Rec. S10561-S10562 (daily ed. July 12, 1978) (remarks of Sens. Bellmon, Huddleston and Leahy). However, Congress did not wish to rely on the *parens patriae* doctrine "because of questions as to its general acceptability in the courts" (H.R. Rep. No. 95-1181, *supra*, at 14). Accord, S. Rep. No. 95-850, *supra*, at 25. Congress was therefore uncertain in 1978 whether

In both 1974 and 1978, therefore, Congress clearly rejected petitioner's apparent contention (Pet. Br. 14-15) that Congress intended, by granting exclusive jurisdiction to the Commission, to make the Commission the sole arbiter of legal questions under the

---

meaningful state involvement in enforcing the Act would occur unless a statutory remedy for the states was expressly created. Thus, Congress enacted Section 6d of the Act, 7 U.S.C. (Supp. III) 13a-2, to make explicit the standing of state officials to sue in the federal courts and to obtain injunctive relief and damages on behalf of injured citizens.

Petitioner contends (Pet. Br. 33, 36-37) that the role assigned to the Commission in Section 6d actions supports the view that Congress intended that the Commission's approval would be required for any legal theory under which a commodity professional could be found liable for damages arising out of violations of the Act. But Congress rejected a provision that would have explicitly required prior approval by the Commission of state actions under Section 6d. See 124 Cong. Rec. S10562 (daily ed. July 12, 1978) (remarks of Sen. Bellmon). Instead, Congress provided in Section 6d(3) of the Act, 7 U.S.C. (Supp. III) 13a-2(3), merely that a state must immediately notify the Commission of any action instituted under Section 6d and that the Commission shall have the right to intervene in any such action. In Congress' view, this provision would assist the Commission in "institut[ing] its own administrative disciplinary proceeding," where the full panoply of its enforcement powers, including registration revocation and civil money penalties (see 7 U.S.C. 9), could be utilized. H.R. Rep. No. 95-1181, *supra*, at 15. Moreover, Congress authorized the states to sue to recover money damages for violations of the Act as an incentive to state officials to bring actions providing a needed supplement to the Commission's enforcement efforts. See 124 Cong. Rec. S10561-S10562 (daily ed. July 12, 1978) (remarks of Sen. Bellmon). See also *id.* at S16527 (daily ed. Sept. 28, 1978) (remarks of Sen. Leahy). The legislative history of Section 6d nowhere suggests that this provision was enacted to ensure that the Commission would be aware or approve of every damage action brought against a commodity professional under the Act.

Act, subject only to appellate review. In 1978, Congress unequivocally confirmed (S. Rep. No. 95-850, *supra*, at 25) that a coherent and uniform body of law would be developed under the Act, not only through the Commission, but also through the federal courts. Although the 1978 Congress was addressing state enforcement actions, rather than private actions, the same reasoning would necessarily apply in both cases. At all events, the court of appeals correctly concluded that (Pet. App. A-27 to A-28) "[t]he exclusive jurisdiction provision * * * should not be construed as extinguishing pre-existing private rights of action by implication since the thrust of the provision was to ensure that regulatory bodies other than the CFTC would not interfere with the orderly development and enforcement of commodities regulation."

3. When Congress amended the Act in 1974, it "sought to encourage inexpensive and expeditious adjudication of customer claims against commodity professionals by requiring the * * * [Commission] to establish a reparation procedure for the resolution of claims arising under the Act." *Rosenthal & Co.* v. *CFTC*, 614 F.2d 1121, 1123 (7th Cir. 1980). Nothing in the statute or legislative history indicates that this remedy was to become the only remedy available to commodity customers,[17] and there is no basis for

---

[17] Under the reparation procedure, customers may recover compensatory damages from commodity professionals, such as futures commission merchants, who have violated any provision of the Act or the Commission's regulations. See 7 U.S.C. (& Supp. III) 18(a) and (e). Congress' determination that commodity professionals should be held liable in damages for violating the Act further distinguishes this case from *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n, supra*, in which the Court held that a private right of action could not be inferred. In that case, Congress had explicitly permitted private parties to seek only

presuming such a congressional intent merely from the fact that a reparations provision was added.[18] Indeed, with respect to other amendments that were enacted in 1974, Congress made explicit its intention that the Commission's jurisdiction should be exclusive. See CFTC Br. 17-18. That Congress never stated that the reparation procedure was intended to preclude private rights of action therefore strongly suggests that such a result was not intended. Cf. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974); *Leist* v. *Simplot*, 638 F.2d 283, 312-315 (2d Cir. 1980), cert. granted, Nos. 80-757, 80-895 & 80-936 (Feb. 23, 1981).

Moreover, the limited nature of the remedy that Congress provided in Section 14 also reflects Congress' intention that reparations would supplement, rather than supplant, private rights of action. The reparation remedy is limited in several respects. Of particular significance in the present context is the limitation contained in Section 14(i) of the Act, 7 U.S.C. 18(i), which provides that the Commission may adjudicate in reparations only those claims that arose after January 23, 1975.[19] Because respondents'

---

injunctive relief under the two statutes involved, and Congress had clearly indicated that damage awards would be inappropriate. See slip op. 15 n.27.

[18] In 1978, Congress noted that the purpose of the reparations procedure was to provide an expeditious and simple remedy "analogous to the operation of a small claims court." S. Rep. No. 95-850, *supra*, at 11, 16. Small claims courts are designed to provide an inexpensive forum for resolving relatively minor disputes without undue delay, but plaintiffs generally retain the right to file their claims, especially larger ones, in other courts if they wish.

[19] See *Barker* v. *Commodity Management Systems, Inc.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,432 (June 2, 1977) and ¶ 20,634 (June 21, 1978), petition for review dismissed *sub nom. Barker* v. *CFTC*, No.

claim arose before that date, petitioner is simply wrong in asserting that reparations provides "individuals such as the Currans a full and complete remedy" (Pet. Br. 12). If the reparations remedy were exclusive, respondents would have no remedy under the Act.[20] Similarly, the reparations remedy is limited in that the Commission may adjudicate claims based on violations of the Act or Commission regulations, but not state law claims. 7 U.S.C. (Supp. III) 18(a). In contrast, as a matter of pendent jurisdiction, a federal court could adjudicate the merits of any state law claim that a customer might present together with his claim under the Act. If, as petitioner contends, Congress has extinguished

---

78-3141 (5th Cir. Nov. 3, 1978), cert. denied, 440 U.S. 980 (1979).

[20] Given Congress' concern in 1974 with increased cheating of customers (see H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 34 (1974)), it is inconceivable that it intended to immunize fraudulent conduct occurring on or before January 23, 1975. That result would necessarily follow, however, if Congress intended in 1974 to extinguish previously recognized private rights of action. Moreover, Congress recognized that the 1974 amendments might affect proceedings or investigations of state and federal regulators who were then enforcing statutes that would be preempted when the exclusive jurisdiction provision took effect. See 120 Cong. Rec. 34737 (1974) (remarks of Rep. Poage); *id.* at 34997 (remarks of Sen. Talmadge). To remedy this problem, Congress enacted a provision ensuring that such proceedings could continue unabated. See Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, Section 412, 88 Stat. 1414. If Congress had understood that the reparations procedure was to be exclusive and that it would therefore have a similar impact upon private claims arising on or before January 23, 1975, Congress surely would have made similar provision for assuring the viability of those claims. Congress' failure to enact such a provision is strong evidence that it did not intend reparations to supplant the preexisting private right of action.

the private right of action under Section 4b, a customer with claims against his futures commission merchant based on violations of both the Act and, for example, state contract law, would be required to file both a reparations claim with the Commission and a contract claim in state or federal court. It is difficult to believe that Congress intended that customers should have to vault two separate hurdles to secure relief. Cf. *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 474 (1959).[21]

In addition, the Commission is required to entertain only those reparation complaints that, "in the opinion of the Commission," allege facts warranting such action. See Sections 14(a) and 14(b), 7 U.S.C. (Supp. III) 18(a) and 18(b). Thus, Congress has granted the Commission apparently unreviewable discretion to determine whether a customer's complaint warrants a reparation proceeding. See *Leist* v. *Simplot*, *supra*, 638 F.2d at 312. In petitioner's view,

---

[21] Unless a private right of action continues to be available, the 1974 legislation will also result in complicating unnecessarily the adjudication of commodity claims. For example, futures commission merchants often bring breach of contract actions against customers who, by failing to meet margin calls, incur debit balances in commodity accounts. See, *e.g.*, *Paine, Weber, Jackson & Curtis, Inc.* v. *Rosciszewski*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,175 (S.D. Cal. Apr. 16, 1981). Even under petitioner's view (Pet. Br. 39), such suits may be brought in state court or, if diversity of citizenship exists, in federal court. Absent a private right of action under the Act, the defendant customer may be unable to bring a counterclaim alleging that the deficiency in his account (as well as the amount of his own damages) resulted from, for example, fraudulent conduct committed by the futures commission merchant in violation of Section 4b. Thus, the customer would be required to bring his Section 4b claim in a reparation proceeding, while being required at the same time to defend a lawsuit involving the same subject matter.

if the Commission were to determine that a complaint did not warrant a reparation proceeding, the customer would be unable to obtain any adjudication of his claim under the Act.

The legislative history also supports the conclusion that Congress intended the reparation remedy to be supplementary. The reparation provisions in the House bill would have authorized any party aggrieved by a Commission reparation decision to appeal that decision to a federal district court. See H.R. 13113, 93d Cong., 2d Sess. § 105 (1974). The aggrieved party would have been entitled to "a trial de novo," which would proceed "like other civil suits for damages," except that the Commission's order would be "prima facie evidence of the facts therein stated." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 7, 121 (1974).

If this provision had been enacted, there might be some basis for concluding that Congress implicitly intended to substitute reparations for private rights of action. The judicial review provision proposed by the House was similar to those available under other federal reparation schemes. See 7 U.S.C. 210 and 499f. In those schemes, however, a private right of action was explicitly made an alternative to reparations. See 7 U.S.C. 209 and 499e. Thus, it might reasonably have been argued that, by not explicitly providing for such an alternative in Section 14, Congress indicated its intent that all private claims should be referred to the Commission, at least in the first instance, thereby eliminating direct access to the courts. Indeed, the de novo review provision could have been read to indicate that Congress intended to extend beyond contract markets the Court's primary jurisdiction holding in *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973), to embrace all dam-

age claims against commodity professionals under the Act.[22]

However, Congress chose not to adopt the de novo review provision. The Conference Committee rejected this approach as well as the Senate approach, which would have authorized review of Commission reparation decisions by district courts under a substantial evidence standard. See S. Rep. No. 93-1131, 93d Cong., 2d Sess. 5 (1974). Instead, the conferees determined to limit the district courts' role in this particular scheme to the enforcement of reparation awards. 7 U.S.C. 18(f). Substantive review of Commission reparation decisions was lodged with the courts of appeals. 7 U.S.C. 18(g). See S. Conf. Rep. No. 93-1194, *supra*, at 7, 34-35. By enacting these provisions, Congress effectively provided parallel review schemes for Commission reparations cases and district court adjudications of private claims under the Act, and thus appears to have intended that reparations should be considered as an alternative to private rights of action.[23] This view is consistent, of course, with the conferees' adoption of the judicial savings clause that the Senate Committee had added, to preserve, among other things, private rights of

---

[22] The absence of contract markets from the list of potential respondents in reparation proceedings (7 U.S.C. (Supp. III) 18(a)) may be explained under this view because this Court already had recognized in *Deaktor* the application of the doctrine of primary jurisdiction to private claims against contract markets arising under the Act.

[23] Although the House Committee report contains certain suggestions that only reparations and arbitration would be available as customer remedies (H.R. Rep. No. 93-975, *supra*, at 22), the Conference Committee's rejection of the de novo review approach of the House bill clearly deprives those suggestions of any weight that otherwise might be attributed to them.

action under the Act (see CFTC Br. 17-18). These factors plainly show that Congress intended reparations and private rights of action to be alternative customer remedies.[24]

---

[24] By continuing to make available a private judicial remedy as an alternative to reparations, Congress effectively accomplished the same election of remedies provided in other federal reparation schemes. See, *e.g.*, 7 U.S.C. 209 and 499e. To be sure, commodity industry representatives complained in 1974 that, in view of the undisputed availability of a private right of action, the enactment of arbitration and reparation schemes (see 7 U.S.C. 7a(11) and 18) would be superfluous and might result in duplicative or inconsistent adjudications of customer claims. See CFTC Br. 12-13. However, Congress was not moved by this argument, and, as the court of appeals recognized (Pet. App. A-33), the Commission answered the industry's objection by construing the Act to require an election of remedies. See 41 Fed. Reg. 3994, 3995 n.5 (1976). Thus, "the utilization of either an arbitration proceeding or civil court litigation is a waiver of the remedies available under the reparation procedures if the arbitration proceeding or court litigation is pursued to a final decision on the merits." *Id.* at 3994. See also 17 C.F.R. 12.21(a)(7), 12.22.

The nature and background of the arbitration remedy mandated by the 1974 amendments also support the Commission's view. The 1974 amendments require that contract markets provide customers with voluntary arbitration procedures to settle their claims and grievances—which need not involve violations of the Act—against contract market members or employees. See 7 U.S.C. 7a(11). Claims subject to these procedures that involve violations of the Act cannot exceed $15,000. 7 U.S.C. 7a(11)(ii). This amount in controversy limitation was enacted in direct response to testimony by members of the commodity industry that it would be appropriate for the courts to continue to adjudicate larger claims against futures commission merchants. See *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., Pt. 1, 403 (1974) (remarks of Alvin W. Donahoo).

That Congress did not extinguish private rights of action in 1974 is further supported by contemporaneous judicial and scholarly opinion that the statutory grievance procedures enacted in 1974 were not intended to be the exclusive forums available to commodity customers.[25] Indeed, the fact that the question was first raised in this case, not by petitioner, but by the court of appeals, demonstrates the extent to which the question was considered to be settled. Not only did petitioner fail to make an appropriate motion in this litigation, but in commenting on the Commission's proposed arbitration rules in 1976, petitioner stated that commodity customers have "three alternatives[:] go to court, reparations or arbitration."[26] Similarly, in 1978 Congress was advised by representatives of the futures industry that a private right of action continued to be available under the Act. See *Reauthorization of the Commodity Futures*

---

[25] See, *e.g.*, *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977); *Bache Halsey Stuart, Inc.* v. *French*, 425 F. Supp. 1231, 1234 n.4 (D.D.C. 1977); *Milani* v. *ContiCommodity Services, Inc.*, 462 F. Supp. 405, 407 (N.D. Cal. 1976). See also Hudson, *Customer Protection in the Commodity Futures Market*, 58 B.U.L. Rev. 1, 39-40 (1978); Schneider, *Commodities Law and Predispute Arbitration Clauses*, 6 Hofstra L. Rev. 129, 133 (1977); Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J. Corp. L. 217, 287 (1976); Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1, 40 (1976).

[26] *Hearing Before the Commodity Futures Trading Commission on Arbitration and Other Dispute Settlement Procedures* 97 (Mar. 5, 1976) (statement of Steven Metz, Esq., on behalf of Merrill Lynch, Pierce, Fenner & Smith, Inc.); see also *Memorandum Regarding Proposed Antifraud Rules*, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,044 at 20,630 n.* (May 16, 1975) (Memorandum of Law of the New York Cocoa Exchange, Inc., and the New York Coffee and Sugar Exchange, Inc.).

Trading Commission: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess., Pt. 2, 581 (1978) ("*1978 Senate Hearings*") (remarks of Messrs. Gelderman and Clagett on behalf of the Futures Industry Association); *id.* at 597 (remarks of Frederick F. Horn).[27] There is no evidence to suggest that Congress disagreed with this view, which was also expressed by the Commission.[28]

---

[27] To the extent that the legislative history of the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865, refers to private rights of action, members of Congress indicated their understanding that these judicial remedies would continue to be available. See 124 Cong. Rec. S16527 (daily ed. Sept. 28, 1978) (remarks of Sen. Leahy); *id.* at S10537 (daily ed. July 12, 1978) (remarks of Sen. Huddleston).

[28] The Commission has adhered to this view since its inception in 1975. See 40 Fed. Reg. 55667 n.10 (1975). It is well-established, of course, that deference should be given to the contemporaneous construction of a statute by those whom Congress has " 'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Moreover, an agency's construction of its statute is entitled to special deference when that construction has weathered the test of time (see *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972)), and when Congress has revisited and amended the statute without expressing any disagreement with the agency's view. See *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 9-10 n.17; *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Indeed, because of concern with the Commission's backlog of reparations claims, Senator Huddleston, the sponsor of the 1978 amendments, suggested that perhaps Congress should "strike out the current authority for reparations proceedings" in order "to get a lot of this out of [the Commission's] shop

In sum, there is no persuasive evidence that even suggests that Congress intended in 1974 to extinguish the private right of action that uniformly had been recognized under Section 4b of the Act. The mere fact that Congress provided additional remedies in 1974 cannot itself suffice to fill that void, particularly where, as here, there is affirmative evidence to show that Congress did not intend such additional remedies to be exclusive. Indeed, because Congress added the additional remedies expressly to *strengthen* the enforcement mechanism of the Act (see *Leist* v. *Simplot*, *supra*, 638 F.2d at 311), and because private rights of action are an essential enforcement device, it would be wholly inconsistent with Congress' intent in enacting the 1974 amendments to conclude that the private civil remedy was implicitly withdrawn.

II. THE RECOGNITION OF A PRIVATE RIGHT OF ACTION UNDER SECTION 4b IS WARRANTED EVEN UNDER THE TEST OF *CORT* v. *ASH*

Even if this Court should conclude that, despite the unique circumstances presented here, the test articulated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), provides the appropriate framework for ascertaining congressional intent, the continued availability of a private remedy under Section 4b is warranted because that result is supported by reference to each of the four factors identified in *Cort*.

---

and into the courts." *1978 Senate Hearings*, *supra*, Pt. 2 at 77, 79. In keeping with its long-standing interpretation, the Commission replied that it favored maintaining the reparations remedy as an inexpensive alternative to litigation. *Id.* at 79 (remarks of Commissioner Read P. Dunn, Jr.). See also *id.* at 267, 410.

1. The threshold inquiry under *Cort* is whether the party asserting the right is within "the class for whose especial benefit the statute was enacted" (422 U.S. at 78). The answer to this question must first be sought in the language of the statute. See *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981), slip op. 6. If the statute is drawn with an "unmistakabl[e] focus on any particular class of beneficiaries whose welfare Congress intended to further," then Congress may be said to have intended to confer federal rights upon those beneficiaries (*ibid.*).

The focus of Section 4b is unambiguous; it seeks to protect commodity customers from fraud. In pertinent part, Section 4b makes it unlawful "for any person, in or in connection with any order to make, or the making of, any * * * [futures contract] for or on behalf of any other person * * * (A) to * * * defraud such other person." 7 U.S.C. 6b.[29] Section 4b may therefore be violated only if the party committing the alleged fraud was acting "for or on behalf of" the defrauded party. Commodity professionals act "for or on behalf of" their customers in connection with futures transactions. See, *e.g.*, page 2, note 2, *supra*. Accordingly, Section 4b was directed precisely at protecting customers from being defrauded by their commodity professionals.[30]

---

[29] The other prohibitions of Section 4b also focus upon acts committed by any person "acting for or on behalf of any other person" that adversely affect "such other person." For example, Section 4b also makes it unlawful "willfully to make or cause to be made to such other person any false report or statement thereof" (7 U.S.C. 6b(B)) and "willfully to deceive or attempt to deceive such other person" (7 U.S.C. 6b(C)).

[30] When Section 4b was enacted in 1936, it was directed only at violations by contract market members and their employees or agents. 7 U.S.C. (1940 ed.) 6b. Congress amended

The legislative history of Section 4b confirms this view. Congress has repeatedly emphasized that the goal of Section 4b is to protect commodity customers. Indeed, when the House Committee on Agriculture first reported favorably on a bill prohibiting fraud in connection with futures trading, it explained that such legislation was needed to "protect the rights of customers as fully as possible." H.R. Rep. No. 1551, 72d Cong., 1st Sess. 3 (1932).[31] Thereafter, the Congress that ultimately enacted Section 4b in 1936 reiterated this fundamental purpose. See S. Rep. No. 1431, 74th Cong., 1st Sess. 3 (1935) ("trade practices involving the cheating of customers * * * must be dealt with more adequately than is possible

---

Section 4b in 1968 to broaden its coverage to include "any person" acting in connection with futures transactions. Pub. L. No. 90-258, Section 5, 82 Stat. 27. Recognizing that some futures commission merchants are not members of exchanges, the Department of Agriculture proposed this amendment to "give customers who deal in commodity futures with non-members [of exchanges] the full protection of the law." *Hearings on H.R. 11930 and H.R. 12317 Before the House Comm. on Agriculture*, 90th Cong., 1st Sess. 48 (1967) (statement of George L. Mehren). See also S. Rep. No. 947, 90th Cong., 2d Sess. 6 (1968).

[31] The House Committee inserted in the antifraud provision the significant language "for or on behalf of." Compare H.R. 12287, 72d Cong., 1st Sess. § 4b (May 24, 1932), with H.R. 7608, 72d Cong., 1st Sess. § 4A (Jan. 13, 1932). The antifraud provision that was eventually enacted as Section 4b was virtually identical to the provision that the House Committee adopted in 1932. Compare H.R. 12287, *supra*, at § 4b, with ch. 545, Section 5, 49 Stat. 1493-1494. In fact, by 1936, the provisions of Section 4b were "not in controversy at all." 80 Cong. Rec. 7911 (1936) (remarks of Sen. Norris). Congress' intent in enacting Section 4b therefore crystallized in 1932, and the House Committee's views at that time are entitled to considerable weight. Cf. *Transcontinental & Western Air, Inc.* v. *CAB*, 336 U.S. 601, 605 n.6 (1949).

under present law"); H.R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935) ("Section 4b makes it unlawful * * * to cheat, defraud, or deceive the customer").[32] Thus, even if the language of Section 4b were at all ambiguous, its legislative history clearly shows that Congress intended to grant customers, the beneficiaries of the antifraud prohibition, the right to be free from fraudulent conduct by their commodity professionals.[33]

---

[32] See also H.R. Rep. No. 1522, 73d Cong., 2d Sess. 5 (1934); 78 Cong. Rec. 10452 (1934) (remarks of Rep. Sabath). *Regulation of Grain Exchanges: Hearing on H.R. 8829 Before the House Comm. on Agriculture*, 73d Cong., 2d Sess. 10 (1934) (remarks of J.M. Mehl); *id.* at 265 (remarks of Dr. J.W.T. Duvel).

[33] Of course, Section 4b was not drafted explicitly to confer on customers a "right" to be free from fraudulent conduct by their commodity professionals. Cf. *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 690 n.13. Instead, Section 4b protects customers by imposing a duty on commodity professionals not to defraud their customers. Similarly, the statute at issue in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 37, 39-40 (1916), imposed a duty to provide secure ladders on railroad cars. Nonetheless, in *Cort* v. *Ash*, *supra*, 422 U.S. at 78, this Court described the statutory duty in *Rigsby* as "creat[ing] a federal right in favor of" the party for whose especial benefit Congress enacted the statute imposing the duty. Section 4b likewise creates a federal right in favor of the class for whose especial benefit it was enacted, commodity customers. See *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 46-47 (1979); *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944); *Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205, 215 (1934). See also Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16, 31 (1913). Compare *California* v. *Sierra Club*, *supra*, slip op. 1, 7 (statute prohibiting "the creation of any obstruction * * * to the navigable capacity of any waters of the United States" is "designed to benefit the public at large" and is "not concerned with the rights of individuals").

2. Where, as here, " 'it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such a cause of action would be controlling.' " *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 694, quoting *Cort* v. *Ash*, *supra*, 422 U.S. at 82 (emphasis in original). Thus, under the second prong of the *Cort* test, petitioner must bear the burden of showing Congress' "explicit purpose to deny" a private cause of action under Section 4b. To meet this burden, petitioner relies upon Congress' enactment in 1974 of express remedies under the Act, and thus argues that Congress thereby indicated its intention to extinguish the private right of action that had previously been held to exist. This reliance is misplaced because, as this Court has recently said, "[t]he creation of one explicit mode of enforcement is not dispositive of congressional intent with respect to other complementary remedies." *California* v. *Sierra Club*, *supra*, slip op. 7 n.6. See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 29 n.6 (White, J., dissenting).[34]

---

[34] This Court's holding in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, is distinguishable because it is based upon certain aspects of the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, that have no parallel here. In *Transamerica*, the Court noted that the Investment Advisers Act, in sharp contrast to other federal securities statutes, contained no express damage remedy whatsoever, and found that this fact "strongly suggests that Congress was simply unwilling to impose any potential monetary liability to a private suitor" (444 U.S. at 21). See also *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, *supra*, slip op. 15 n.27. In addition, the Court noted that Congress had, in the course of developing that Act, specifically deleted a grant of jurisdiction to the courts to entertain "actions at law brought to enforce any liability," which would have included private

In any event, as we have shown, Congress acted in 1974 to preserve, not foreclose, the private rights of action that had been judicially recognized. See CFTC Br. 17-26; pages 9-23, *supra*. In fact, Congress was alerted to the argument that petitioner now makes—that the enactment of reparations foreclosed private rights of action. In order to avoid that result, Congress was urged to include "explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there." *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., Pt. 3, 737 (1974) (statement of Roy A. Schotland). Congress enacted the broad judicial savings clause in Section 2(a)(1) of the Act, 7 U.S.C. 2, to accomplish this purpose, among others. See CFTC Br. 17-22. Accordingly, even if it were necessary to show such an intent, the language and legislative history of the 1974 amendments demonstrate that Congress intended that customers should be able to enforce Section 4b in private damage actions.

3. The third prong of the *Cort* test requires consideration of the question whether a private right of action is consistent with the underlying purposes of the statute. Where the remedy "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 703. The continued avail-

---

damage suits. See 444 U.S. at 21-22. Here, of course, Congress expressly approved the imposition of monetary liability on any commodity professional who violates the Act (7 U.S.C. (Supp. III) 13a-2, 18(a)), and explicitly preserved the jurisdiction of the courts to entertain damage suits (7 U.S.C. (Supp. III) 2).

ability of private rights of action under the Act satisfies this standard.

Historically, the primary goal of the Act has been "to insure fair practice and honest dealing on the commodity exchanges." H.R. Rep. No. 421, *supra*, at 1. See also S. Rep. No. 93-1131, *supra*, at 1. In 1974, Congress perceived that the realization of this purpose might be jeopardized as growing numbers of the "general public" began trading in the futures markets (*id.* at 18), given the fact that "such trading is now poorly regulated, if it is regulated at all." 120 Cong. Rec. 34997 (1974) (remarks of Sen. Talmadge). Congress was particularly concerned about "confidence games," "fraud," and the "cheating of customers and other sharp practices not easily discoverable by the victims." H.R. Rep. No. 93-975, *supra*, at 34. Congress therefore enacted "remedial legislation designed to correct certain abuses which * * * exist in areas that will now come within the jurisdiction of the Commodity Futures Trading Commission." 120 Cong. Rec. 34997 (1974) (remarks of Sen. Talmadge).

The Commission's efforts to achieve this congressional objective are necessarily limited by budgetary constraints. Private rights of action provide a crucial supplement to the Commission's attempts to enforce the remedial provisions of the statutory scheme, particularly the antifraud provision of Section 4b of the Act, 7 U.S.C. 6b, and therefore help to deter those practices that Congress sought to correct in 1974. Moreover, by providing an alternative to the administrative reparations procedure that Congress established in 1974 (7 U.S.C. 18), private rights of action under Section 4b divert from the administrative process more complex claims that customer plaintiffs may prefer to litigate in the federal courts (where, among other things, broader discovery is available).

Thus, the continued availability of the federal courts to adjudicate claims under the Act permits the Commission to decide more quickly the cases before it and thereby assists in fulfilling Congress' goal that reparations "bring about inexpensive and expeditious adjudication of customer claims." S. Rep. No. 95-850, *supra*, at 11.[35]

As petitioner concedes (Pet. Br. 37), one of the purposes of the 1974 amendments was to provide protection and redress for persons who participate in futures trading. This purpose is reflected both in the statutory grievance procedures enacted in 1974 (7 U.S.C. 7a(11), 18) and in the state enforcement procedures that were enacted in 1978, which contemplate class actions on behalf of commodity customers to recover monetary damages. See 7 U.S.C. (Supp. III) 13a-2. See also 124 Cong. Rec. S10561-S10562 (daily ed. July 12, 1978) (remarks of Sen. Bellmon). In enacting and amending this statute, "Congress was * * * concerned with the rights of individuals." *California* v. *Sierra Club*, *supra*, slip op. 7. Thus, the Commission has always maintained that the continued availability of private rights of action is both plainly consistent with this congressional concern and essential to the effectuation of the statutory policy.[36] As one court has recently held, "[t]he implica-

---

[35] In fiscal year 1980 the Commission docketed 741 reparation complaints and closed 278. At the end of that fiscal year, 1203 reparation complaints were still pending before the Commission. See *1980 Commodity Futures Trading Commission Annual Report* 26-28. See also S. Rep. No. 95-850, *supra*, at 16.

[36] The Commission has consistently and unequivocally taken the position that a private right of action "will provide effective assistance to achieving the statutory purposes." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 707. See page 22, note 28, *supra*. As the expert agency charged by Congress

tion of a private right of action is consistent with [Congress'] goal, as it adds another means by which a party may strike out at fraudulent conduct in the trading of commodities. * * * No showing has been made that adding this weapon to the enforcement arsenal will impede the government's efforts to regulate the market." *Wichelman* v. *Monex International, Ltd.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,228 at 25,121 (N.D. Cal. July 24, 1981).

4. The final question to be considered under the *Cort* test is whether a private right of action "is within the federal domain of interest." *California* v. *Sierra Club*, *supra*, slip op. 10. The substantial federal interest in the adjudication of Section 4b fraud claims by commodity customers against their futures commission merchants is unambiguously reflected in the exclusive jurisdiction provision of Section 2(a)(1) of the Act, 7 U.S.C. 2. Not only is this subject matter not one that is relegated to state law (see *Cort* v. *Ash*, *supra*, 422 U.S. at 84-85), but Congress has precluded the application of state regulatory law. In sum, this is an area of substantial federal concern.

---

with exclusive administration of the regulatory scheme of the Act, the Commission's view is, in this regard, entitled to substantial weight. Compare *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1977).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

BARRY SULLIVAN
Assistant to the Solicitor General

PAT G. NICOLETTE
Deputy General Counsel

GREGORY C. GLYNN
Associate General Counsel

MARK D. YOUNG
Assistant General Counsel

NANCY E. YANOFSKY
Attorney
Commodity Futures Trading Commission

SEPTEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 353971 615